Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

M. ROBERT ULLMAN,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ of Certiorari
To The United States District Court
for the Eastern District of Pennsylvania
and
The U. S. Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
Plaintiff and Counter-claim Defendant	:	Civil Action No. 01-0272
v.	:	
M. ROBERT ULLMAN, Defendant and Counter-claim Plaintiff	:	

COUNTERCLAIM PLAINTIFF, M. ROBERT ULLMAN'S ANSWER TO THE SECOND MOTION FOR SUMMARY JUDGEMENT OF THE UNITED STATES

STATEMENT

The UNITED STATES SECOND MOTION FOR SUMMARY JUDGEMENT and its MEMORANDUM in support of that motion is so full of FACTUAL ERRORS that were it not for the name of M. Robert Ullman that appears in the heading, it would be difficult to recognize that the Department of Justice is filing a second motion for Summary Judgement in the same Civil Case No. 01-CV-272.

In order to put the true facts in front of this court, the Counterclaim Plaintiff offers the following FACTUAL INFORMATION:

1. There were two penalty assessments made against M. Robert Ullman, as a responsible party, for the non-payment of Trust Fund Taxes

by Canoe Manufacturing Co.

a. Tax Period Ending Dec. 31, 1988. Assessment date Oct. 23, 1989, Statute of Limitation for collection (10 years) Oct. 23, 1999, in the AMOUNT OF $952,010.88. (Exhibit #1)

b. Tax period ending June 30, 1989. Assessment date Feb. 4, 1991, STATUTE OF LIMITATION FOR COLLECTION (10 YEARS) FEB. 4, 2001 in the amount of $80,430.47 (Exhibit #2)

2. The IRS filed a LIEN against M. Robert Ullman in Berks County (Pa.) Court for period ending Dec. 31, 1988 on March 11, 1990 (Exhibit 3A) Period ending June 30, 1989 on March 12, 1991 (Exhibit 3B)

3. On JANUARY 25, 1995, M. Robert Ullman signed a 433D INSTALLMENT AGREEMENT. The total due on that date, including interest, was **$1,627,884.69**. (Exhibit #4)

   In this agreement, M. Robert Ullman agreed to pay **$600.00 per month.**

   The total payment due until the last Statute of Limitations collection date was **$36,600.00** (61 months X $600.00), BUT WAS SUBJECT TO CHANGE.

   M. Robert Ullman made monthly payments until Jan. 1, 1990 **totaling $33,604.00.**

4. On March 9, 1989, the Canoe Manufacturing Chapter 11 case was, upon a motion of the

Internal Revenue Service, converted to a Chapter 7 Liquidation.

An IRS representative was in Bankruptcy Court (Reading, Pa.) when the court approved the IRS motion. Thus, the IRS knew the exact date that M. Robert Ullman "LOST CONTROL" of the company. After that date, until June 30, 1989 the U. S. Attorney was responsible for payment of Trust Fund Taxes.

The U. S. Trustee was also responsible for filing the quarterly returns for the first and second quarters. (Exhibit #5)

5. The Counterclaim Plaintiff, M. Robert Ullman, has zero assets and no life insurance.

   Other than the IRS liens, the following liens are on record against M. Robert Ullman:

   a. Meridian Bank (First Union) $3,310,262. (Exhibit #6)

   b. Small Business Administration - a balance of $211,826 due on a $480,000 Hurricane Agnes flood loan to Canoe Manufacturing Co. (Exhibit #7)

   c. Commonwealth of Pennsylvania - approx. $392,915.00 (Canoe Manufacturing Co. taxes). (Exhibit #23)

Thus there was NO CONCEIVABLE WAY for the United States to collect FULL PAYMENT, and they were well aware of the situation.

6. The 433D AGREEMENT between the IRS and M. Robert Ullman regarding the reduction of the monthly payments in the event that the PBGC followed through with their intention to reduce the monthly pension paid M. Robert Ullman, was BOTH ORAL AND WRITTEN.

   In the 433D Agreement, signed on Jan. 25, 1995, Agent Clarke, upon agreement, inserted into "ADDITIONAL CONDITIONS": "Agreement will be re-evaluated on or about 1-26-97".

   Agent Clarke was made aware of the PBGC intention when he first became involved in the case (September 1993).

   At the signing on January 25, 1995, M. Robert Ullman insisted that he was not satisfied with the comment, "I give you my word that any PBGC reduction would automatically guarantee a like amount of reduction." He insisted upon a review guarantee by Jan. 25,1997, which Agent Clarke accepted. It was Agent Clarke who asked M. Robert Ullman "When will you know about the possible reduction?" and M. Robert Ullman stated "in 2 years", this being an outside date.

7. The IRS knew, on March 9, 1989, the EXACT DATE that M. Robert Ullman "lost control' of Canoe Manufacturing, but REFUSED to amend the $80,430.47 assessment for the first and second quarters of 1989 until May 22, 2000. (Exhibit #8) IT TOOK 11 YEARS TO FINALLY ISSUE A CREDIT OF $31,308.96, but with interest the debt is now $104,835.52.

The Counterclaim Plaintiff offers the following

documents as evidence to show the 11-year struggle:

Feb.25, 1999 - M. R. Ullman. to Romito (Exhibit #9)

Aug. 1, 1999 - M. R. Ullman to Romito (Exhibit #10)

Nov. 2, 1999 - M. R. Ullman to Agent Clarke (Exhibit #11)

Nov. 3, 1999 - M. R. Ullman to Agent Clarke and PRO Romito (Exhibit #12)

Nov. 8, 1999 - M. R. Ullman to Romito (Exhibit #13)

Nov. 16, 1999 - M. R. Ullman to Agent Bucci (Exhibit #14)

May 4, 2000 - Romito to Atty. Chernicoff (Exhibit #15)

The agents in the Reading, Pa. office of the IRS were continually made aware of the problems associated with the first and second quarters of 1989 (from 1993 onward).

THE COUNTERCLAIM PLAINTIFF, M. ROBERT ULLMAN, ANSWERS THE UNITED STATES SECOND MOTION FOR SUMMARY JUDGEMENT WITH THE FOLLOWING:

1. The tax liability of M. Robert Ullman is pursuant to two (2) assessments:

October 23, 1989 - $952,010.82
February 4, 1991 - $80,430.47 (later reduced to $49,121.51)

2. On May 22, 2000, the IRS finally agreed with the Ullman position of the date Ullman "lost control" of Canoe Manufacturing Co.

3. The reduction, in April of 2000,by M. Robert Ullman in his $600.00 monthly payment was because of the PBGC reduction, and HAD NOTHING TO DO WITH THE $31,308.96 ABATEMENT.

4. It was the Problem Resolution Officer, Louis Romito, who, on March 26, 2000, after numerous discussions between M. Robert Ullman and Mr. Romito, Agent Bucci, and IRS Attorney Peduzzi, ADMITTED THAT THE 433D DOCUMENT WAS AN AGREEMENT/CONTRACT. (Exhibit #16)

5. Every U. S. citizen, including the Counterclaim Plaintiff, expects his/her government to honor an agreement. IT IS AS BASIC OR FUNDA-MENTAL AS ONE CAN EXPECT FROM HIS/HER GOVERNMENT.

   The Taxpayers Bill of Rights #2, IRS Reform Act of 1998 clearly states that "THE IRS HAS THE BURDEN OF PROOF THAT ITS POSITION IN ITS CASE AGAINST THE TAXPAYER WAS SUBSTANTIALLY JUSTIFIED." (Section 7433)

   The court decision on January 29, 2002 only vacated the order of October 30, 2001, which referred only to the counterclaim of M. Robert Ullman; it did not affect the initial action against M. Robert Ullman to reduce a tax assessment to a judgement.

   On February 11, 2002 the court declared the first U.S. Motion for Summary Judgement and the Robert Ullman Motion for Summary Judgement a "moot".

6. THE ORIGINAL DEFENSE OF M. ROBERT ULLMAN REGARDING THE GOVERNMENT ACTION AND THE "7433" CLAIM FOR UNAUTHORIZED COLLECTION IS THE ISSUE AT HAND.

7. The original agreement between M. Robert Ullman and Agent Clarke was originally oral, but confirmed in writing as part of the 433D Agreement signed on Jan. 25, 1995.

8. The "MATERIAL FACTS" as stated by the United States in the second motion for Summary Judgment are FACTUALLY INCORRECT, and the court should reject this motion for Summary Judgement. For example:

   a. Section III: "Such a written installment agreement allows the taxpayer to satisfy a tax liability by making scheduled periodic payments until the liability is paid in full (26-CFR #301-6159-1-(a) emphasis added).

      It is RIDICULOUS to even state that M. Robert Ullman could pay a **$1,627,884.00 debt** (and increasing) in FULL with $600.00 per month payments. It would take 271 months or 225 years (with accruing interest) to complete payments.

      The Statute of Limitations expiration date for the second assessment was Feb. 4, 2001.

   b. Section III: "The installment agreement is not a contract (pursuant to 26 USC 6159)."

> On May 28, 1999, Louis Romito, the Taxpayer Advocate, when referring to the 433D Agreement, wrote, "However, I agree with you that it (433 agreement) is sufficiently contract like that both parties to the agreement are bound by its terms as though it was a contract." (Exhibit #16)
>
> Mr. Romito was assigned to this dispute by Commissioner Rossotti.

An agreement to pay $600.00 per month or 27% of a taxpayer's monthly income was surely a CONSIDERATION to get the United States to release its lien upon M. Robert Ullman's monthly Social Security check (Exhibit #17) and PBGC pension payment (Exhibit #18).

In addition to the "Additional Conditions" that were added by Agent Clarke, the following STANDARD CONDITIONS WERE INCLUDED IN THE 433D AGREEMENT.

> "This agreement is based upon your current financial condition. It is subject to revision or termination if subsequently information required by the IRS reflects a change in your ability to pay."

Thus, if M. Robert Ullman suddenly found $2,000,000 or won a $35 million judgement against the Meridian Bank or won the Pennsylvania lottery, the U. S. Government would have every right to terminate or revise the 433D Agreement. It is a FACT that the United States had, in 1995, ISSUED A LEVY against any funds that were forthcoming from a Meridian settlement.

The claim against a FUTURE LEGAL DECISION against Meridian Bank was explicit in the IRS/Ullman negotiation in 1994-1995.

In 1993, the Internal Revenue Service was made aware of the Ullman action against Meridian Bank. In order to protect their (IRS) interests, the Service sent a NOTICE OF LEVY (Exhibit #19) to Attorney Robert Fellheimer, the Robert Ullman attorney (on contingency) in Schuylkill County (Pa.) to collect a $35 million claim against Meridian Bank.

The United States expected to get full payment if Robert Ullman were able to prevail in his Schuylkill County action.

In a letter dated October 24, 1994 to the District Director (Exhibit #20-21), M. Robert Ullman stated very clearly that IF THE SCHUYLKILL COUNTY ACTION WAS SUCCESSFUL THE IRS WOULD BE PAID IN FULL.

Thus the United States expected the 433D Agreement, which stated "it is SUBJECT to revision or termination if subsequent financial information required by the IRS reflects a change in your ability to pay" to prevail on the upside, but was unwilling to recognize their legal (by contract and law) obligation on the down side.

In 1996, 1997 and 1998, Kaye G. Ullman, spouse of M. Robert Ullman, suffered a loss exceeding $100,000 in her children's outlet store, but although the IRS was insistent in including Kaye Ullman's income in Robert Ullman's "ability to pay", they REFUSED TO CONSIDER THE HUGE LOSS. The Ullman tax returns for these years have already been submitted to this court.

Section IV

M. Robert Ullman never claimed that Agent Eugene

Clarke engaged in an illegal collection activity. However, M. Robert Ullman did charge THAT THE REFUSAL TO RECOGNIZE THE IRS REGULATION WAS ILLEGAL. M. Robert Ullman DID try to protect his economic welfare by arguing about the $600.00 payment AND HIS FAMILY REDUCTION IN INCOME.

It was the IRS who, in May of 2000 engaged in ILLEGAL ACTIVITY BY REFUSING TO HONOR A CONTRACT/AGREEMENT.

THE ONLY ISSUE IN THIS CASE IS THE FAILURE TO ALLOW A REDUCTION, FOR 8 MONTHS, IN THE $600.00 MONTHLY PAYMENT, A TOTAL REDUCTION OF $2,952.00, AN ILLEGAL ACTIVITY.

CONCLUSION

This case for the $2,952.00 is a very big deal, or so it seems. The Internal Revenue Service has been very reluctant to recognize or agree with certain provisions of the Taxpayers Bill of Rights and the IRS Restructuring Act of 1998, which was intended to eliminate the strong arm, intimidation tactics of the Collection Department of the Internal Revenue Service. One must read the congressional testimony proceeding passage of the 1998 Restructuring Act to understand the problem. (Exhibit #24)

This is "pay back time" caused by M. Robert Ullman's effort to solicit help from the U. S. Senate Finance Committee, in particular its chairman, Senator Roth (Exhibit #25). M. Robert Ullman has zero political power and has never contributed to a senate or presidential campaign.

THIS IS A CONSTITUTIONAL RIGHT!

It is a case of the Collection Department MAINTAINING POWER over the upstart Taxpayer Advocate (Problem Resolution Officer) whom they consider an unnecessary burden.

THERE CAN BE NO REASON FOR THE UNITED STATES (THE DEPARTMENT OF JUSTICE) TO SUBMIT FACTUALLY INCORRECT STATEMENTS IN THEIR CURRENT MOTION.

FINALLY...

THE 433D INSTALLMENT AGREEMENT IS A "CONTRACT" (BETWEEN THE UNITED STATES AND THE TAXPAYER). It is an agreement between two parties creating OBLIGATIONS that are enforceable or otherwise recogniz-able at law. It is not a mere "accommodation" or method for paying "in full" a debt due. It has "CONDITIONS" THAT REQUIRE both the taxpayer and the government to INCREASE OR DECREASE the amount being paid (thus the total amount) according to the income of the taxpayer (an obligation).

As it so states, "This agreement is based upon your current circumstances (on Jan. 25, 1995). It is SUBJECT TO [1] revision or termination if subsequent financial information required by the IRS reflects a change in your ability to pay".[2]

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[1] "Subject to" - contingent on or under the influence of some later action (the increase or decrease in the ability to pay)

[2] The United States intentionally left out that paragraph in their motion. (Page 7)

The "SPECIAL CONDITIONS", inserted into the contract by the collection officer, was not an "oral agreement"; it was INSERTED to provide an OBLIGATION on behalf of the United States to make a reduction in the monthly payment IF the PBGC monthly payment was reduced. The collection officer was well aware of the POSSIBILITY, in 1994, of such a reduction.

The $600.00 payment was based upon current income (1994) and was not a mere method to collect in full a $1.6 million debt. It was a NEGOTIATED amount, first $400.00, then $1,000.00, and finally $600.00 (TO BE EXAMINED IN TWO YEARS).

The Pro Se litigant requests the court to reject the United States second Motion for Summary Judgment and allow this case to go to trial.

This Pro Se litigant does realize the huge burden he is undertaking and prays that the court will be patient and understanding in an upcoming trial. But this plaintiff will do his very best to present as uncomplicated an argument as possible.

Respectfully submitted,

M. Robert Ullman

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 01-0272
	:	
M. ROBERT ULLMAN,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J. May 8, 2002

Presently before the Court is the United States' Motion for Summary Judgment on Defendant's counter-claim pursuant to 26 U.S.C. § 7433 alleging that the Internal Revenue Service (the "IRS") intentionally, recklessly or negligently violated the Internal Revenue Code in collecting taxes allegedly owed by him. Defendant, a pro se litigant, also moves for summary judgment on this same counter-claim. For the reasons stated below, the United States' Motion for Summary Judgment is granted and Defendant's

Motion for Summary Judgment is denied.

I. FACTS AND PROCEDURAL HISTORY

The United States initiated this proceeding on January 18, 2001 by filing a one-count complaint to reduce a tax assessment to judgment against M. Robert Ullman ("Ullman" or "Defendant"), for his unpaid tax liability. Defendant's tax liability stems from a February 4, 1991 trust fund recovery penalty assessment resulting from a determination that he was the responsible person for the employee withholding taxes of Canoe Manufacturing Co. Inc. for the first and second quarters of 1989.[1]

The IRS subsequently agreed to allow Ullman to pay his tax liability in installments. He first attempted to negotiate a $400.00 per month payment, which the IRS

[1] Defendant believes it is more accurate to describe his tax liability as two assessments: (a) October 23, 1989 in the amount of $925,010.88; and (b) February 4. 1991 in the amount of $80,430.47. For purposes of Defendants counterclaim pursuant to 26 U.S.C. § 7433, it is irrelevant in what manner the penalty was assessed.

rejected, contending that Ullman had the ability to make payments of $1,000.00 per month. Eventually, Ullman and the IRS entered into an installment agreement on January 25, 1995, which required Ullman to make monthly payments of $600.00. According to Ullman, during the negotiation process, he made known to the Revenue Officer handling his case, Eugene Clarke ("Clarke") that a reduction in his pension payments was imminent. Clarke inquired, "When could the reduction occur?" Ullman answered, "Within two years." Clarke responded, "If that occurs, we will reduce your monthly payments by a like amount."

In addition to Ullman's complaints that he could not afford $600.00 monthly payments, throughout the installment negotiation process, he consistently maintained that he was not responsible for the tax debt. Ullman claimed that Meridian Bank maintained third party responsibility for the tax debt, because Meridian Bank controlled funds providing payment for wages of Canoe Manufacturing employees pursuant to an agreement between Meridian Bank and

Ullman. Ullman also claimed that the IRS had miscalculated his ability to pay monthly installment amounts by including his wife's income in the financial statement analysis and by failing to take into account his pension reduction.

Despite Ullman's dissatisfaction with the IRS' handling of his case, he consistently and fully made monthly payments to the IRS as provided for under the January 25, 1995 installment agreement. However, after approximately five years of timely payments, Ullman reduced his monthly $600.00 installment payment to the IRS when the Pension Benefit Guarantee Corporation finally reduced his pension in March, 2000. The IRS construed Ullman's conduct as a unilateral reduction in monthly installment payments without authorization from the IRS. Consequently, the IRS terminated the installment agreement. See 26 U.S.C. § 6159(b) (4) (A) (authorizing termination of an installment agreement when a taxpayer fails to pay any installment at the time such installment payment is due). Ullman main-

tains that Revenue Officer Clarke authorized such reduction at the time that the installment agreement was executed.

Defendant filed an answer to the United States' complaint and a counterclaim against the IRS on February 8, 2001. In addition to his other counterclaims, Defendant alleged that the IRS violated a signed installment agreement.

On October 30, 2001, the Court entered an Order granting the United States' first Motion for Summary Judgment, entering a judgment in favor of the United States and against Defendant for trust fund recovery penalty taxes for the first and second quarters of 1989 in the amount of $112,010.95 plus statutory additions accruing according to law from May 1, 2001, and dismissing Defendant's counterclaims against the United States. The Court dismissed Defendant's counterclaim for unauthorized collection activities pursuant to 26 U.S.C. § 7433 (the subject of the instant motion) as time barred by the two year statute of limitations. See 26 U.S.C. § 7433(d) (3) (setting two year limitations period).

Subsequently, Defendant filed a Motion to Reconsider the Court's Order dated October 30, 2001, which the United States opposed. On January 29, 2002, the Court signed an Order vacating the Order dated October 30, 2001 with respect to Defendant's counterclaim alleging unauthorized collection activities in violation of 26 U.S.C. § 7433 and reinstating Defendant's counterclaim. In its decision, the Court relied on Defendant's allegations that the installment agreement he entered into with the IRS may have permitted him to reduce his monthly installment payments to the IRS. As noted above, Ullman alleges that during negotiation of the January 25, 1995 installment agreement he notified Revenue Officer Clarke that he expected a reduction in his monthly pension benefits within the next two years and that Clarke told him that if his pension benefits were reduced, he could reduce his monthly installment payment by a like amount. Ullman contends that he relied on this alleged oral agreement when he reduced his monthly installment payment. Based upon these allegations, the Court, in its

January 29, 2002 decision, reasoned that:

> If the oral terms, to which Defendant refers, became part of the installment agreement and entitled Defendant to reduce his monthly installment payments to the IRS once his pension payments were similarly reduced, it does not appear that the IRS had any authority to terminate Defendant's installment agreement. The Court assumes that without such authority, the IRS' act of unjustifiably terminating a valid installment agreement would be in disregard of a statute of the Internal Revenue Code or a regulation promulgated thereunder in connection with the collection of Federal tax in violation of 26 U.S.C. §)433.

The parties now bring cross-claims for summary judgment with respect to Defendant's counterclaim alleging unauthorized collection activities in violation of 26 U.S.C. § 7433.

II. STANDARD

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The non-movant's allegations must be taken as true and, when

these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources ... must be viewed in the light most favorable to the party opposing the motion." Id.

III. DISCUSSION

Under 26 U.S.C. § 7433(a), a cause of action lies where an IRS employee recklessly or intentionally disregards any provision of the Internal Revenue Code in connection with its tax collecting activities. Under § 7433(b), the taxpayer can recover his "actual, direct economic damages sustained" as a "proximate result" of an IRS employee's improper actions under § 7433(a).

In support of his counterclaim, Ullman asserts a myriad of complaints, many of which were addressed in this Court's Memorandum and Order dated October 30, 2001,

granting summary judgment to the United States. The Court will limit its examination to those issues which pertain to Ullman's counterclaim pursuant to 26 U.S.C. § 7433 as framed in the Court's Order granting Defendant's Motion for Reconsideration dated January 29, 2002.

Ullman's primary argument is that the January 25, 1995 installment agreement, entered into between himself and the IRS, was a contract providing for certain terms and conditions, which were not honored by the IRS. Specifically, Ullman alleges that the IRS did not honor (1) the oral agreement entered into contemporaneously with the written agreement, allowing him to reduce his monthly payments to the IRS as soon as his pension benefits was similarly reduced; (2) the standard condition written on the face of the document stating:

> This agreement is based on your current financial circumstances: It is subject to revision or termination if subsequent financial information required by IRS reflects a change in your ability to pay;

and (3) the statement appearing in the comments section on the face of the installment agreement, "Agreement will be reevaluated on or about 1-26-97."

Ullman states that the (1) IRS terminated the installment agreement when he reduced the monthly installments after his pension was reduced; (2) the IRS never revised the installment agreement despite information reflecting a change in his ability to pay and despite repeated requests; and (3) the installment agreement was never reevaluated on 1-26—97 or at any time. Ullman argues that these infractions, culminating in the IRS' termination of the installment agreement, were breaches of a binding contract and constitute unauthorized collection activities in violation of 26 U.S.C. § 7433.[2] In support of his breach of contract theory, Ullman points to a letter written by Mr. Louis Romito ("Romito") of the Taxpayer Advocate in which Romito stated "I agree with you that [the installment agreement] is sufficiently contract like that both parties to the agreement are bound by its terms as though it was a

contract."

It is axiomatic that before a contract may be found, all of the essential elements of a contract must exist, including consideration. 8 P.L.E. Contracts § 9 (1971). The requirement of consideration, of course, is nothing more than a requirement that there be a bargained for exchange. Estate of Beck, 414 A.2d 65, 68 (Pa. 1980). There can obviously be no such bargained for exchange if one of the parties is already legally bound to render the performance promised. Chatham Communications. Inc. v. General Press Corp., 344 A.2d 837, 840 (Pa. 1975); Cohen v. Sabin, 307 A.2d 845, 84g (Pa. 1973).

Ullman argues that his agreement to pay $600.00 per month, or 27% of his monthly income, was more than sufficient consideration to form a contract. While the Court recognizes the significant burden $600.00 monthly payments

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[2] Although Ullman has not pointed to a specific Internal Revenue code provision that the IRS intentionally, recklessly or negligently violated as required under 27 U.S.C. 7433, the court assumes that his allegations, if true, would constitute the unlawful termination of the installment agreement in violation of 26 U.S.C. § 6159.

placed on Ullman, his agreement to make the monthly payments as provided for under the installment agreement cannot constitute the required consideration because those monthly payments were credited against a tax liability for which Ullman was already obligated. Prior to the execution of the January 25, 1995 installment agreement, Ullman's tax liability was established through a trust fund recovery penalty assessment resulting from a determination that he was the responsible person for the employee withholding taxes of Canoe Manufacturing Co. Inc. for the first and second quarters of 1989. It was only because of the pre-existing tax liability and the IRS' assumption that a monthly payment arrangement would facilitate the collection process, that the IRS agreed to accommodate Ullman and allow for payment of the assessment on an installment basis

Thus, although an agreement in the general sense, the installment agreement is not a contract in the sense that breach of its terms gives rise to a common law breach of contract action because of the absence of consideration on the part of Ullman. The IRS would no more have a claim

against Ullman for breach of contract had he missed a monthly payment to the IRS as Ullman now assumes he has against the United States for allegedly failing to honor certain terms of the installment agreement. Pursuant to the installment agreement, the IRS allowed Ullman to satisfy his pre-existing tax liability over time. For purposes of 26 U.S.C. § 7433 it is irrelevant whether Revenue Officer Clarke orally promised Ullman that he could reduce his payments once his pension benefits were reduced because breach of this alleged oral contract does not constitute a violation of the Internal Revenue Code and therefore, is not cognizable as an unauthorized collection activity for which a cause of action would lie under 26 U.S.C. § 7433.

In contrast to the legal concept of a binding contract, which requires consideration, an installment agreement operates pursuant to statute. See 26 U.S.C. § 6159. The IRS is authorized to enter into a written agreement allowing payment of taxes on an installment basis if it is determined that the agreement will facilitate collection. 26 U.S.C. § 6159(a). 26 C.F.R. § 301.6159-1.(a). Thus, oral agreements are not

contemplated by the statute. Accordingly, oral agreements would not be incorporated into the terms of a written installment agreement.

An installment agreement may be terminated or modified for a variety of reasons including when the taxpayer fails to pay any installment at the time the payment is due under the agreement. 26 U.S.C. § 6159(b) (4). Once an installment agreement has been executed, the IRS may only terminate the agreement if a condition enumerated in the statute is present. Termination for any reason other than those enumerated in the statute would be in violation of 26 U.S.C. § 6159 and could perhaps give rise to a cause of action for unauthorized collection activities under 26 U.S.C. § 7433. In this case, however, the January 25, 1995 installment agreement required Ullman to make a $600.00 payment to the IRS each month. Starting in May of 2000, Ullman failed to do so and made payments of only $224.40 per month. Because Ullman failed "to pay an installment at the time such installment payment [was] due," the IRS was authorized, pursuant to 26 U.S.C. 6159(b) (4) (A), to terminate the

installment agreement and take other lawful action to ensure that it would received payment on Ullman's tax liability.

In sum, there is no legal contract for which breach of its terms would give rise to a cause of action because the lack of consideration on the part of Ullman prevents the installment agreement from being treated as such. Furthermore, breach of a contract does not constitute a violation of the Internal Revenue Code, a requirement under the statute which Ullman brings his counterclaim. Lastly, the IRS acted properly and pursuant to statute in terminating the installment agreement when Ullman failed to make the full $600.00 payment as provided under its terms.

As tor Ullman's complaint that the IRS refused to reevaluate his monthly payments on 1-26-97, as provided on the face of the installment agreement, Ullman argues that this backs up, in writing, Revenue Officer Clarke's oral promise that his installments would be reduced once his pension benefits were reduced because that was the approximate date that Ullman anticipated a reduction in his

pension. A taxpayer may request that the IRS alter, modify or terminate the terms of the installment agreement because of a change in the taxpayer's financial circumstances. 26 U.S.C. § 6159(b)(3). However, Ullman' s change in financial conditions, i.e., the reduction in pension benefits, did not occur until March 2000. Thus, any obligation on the part of the IRS to reevaluate Ullman' s installment payments on 1-26-97 was not yet triggered because the changed financial conditions of reduced pension benefits had not yet occurred. With respect to the installment agreement's boilerplate language that it is "subject to revision or termination if subsequent financial information required by IRS reflects a change in your ability to pay," IRS calculations repeatedly show that any revision would require Ullman to pay more than the $600.00 which was required under the January 25, 1995 installment agreement, even after March 2000 when his pension was finally reduced.

Ullman also argues that the installment agreement he executed was not the statutory instrument described in 26 U.S.C. § 6159, but rather an offer in compromise. An offer

in compromise is a contractual agreement between the IRS and a taxpayer under which the taxpayer agrees to pay a specified amount in full settlement of assessed tax liabilities. See 26 U.S.C. § 7122(a). In support of this contention, Ullman notes that it would take approximately 225 years to pay off his total tax liability of $1,627,884.69 by making $600.00 monthly payments. Therefore, given this anomalous period of time, Ullman argues that the IRS never intended to collect the full amount of his tax liability but rather was willing to accept a part of the liability in full settlement of the assessed liability.

Ullman's arithmetic, which could just as easily exhibit the generous accommodation the IRS made for Ullman, does not establish that the January 25, 1995 installment agreement was actually an offer in compromise. In fact, the record establishes that the agreement should not be construed as anything other than an installment agreement.

First, the document was written on an IRS Form 433-D, entitled "Installment Agreement." Second, the agreement provides that "$600.00 will be paid no later than the 25th of

each month thereafter until the total liability is paid in full." (emphasis added) . Further, there is evidence that Ullman twice attempted to enter into an offer in compromise and settle with the IRS for a lesser amount than that of his total tax liability, but the IRS did not accept his offers because of the insufficiency of the amount Ullman offered.

Therefore, because of the lack of supporting evidence suggesting that the January 25, 1995 agreement was actually an offer in compromise and the evidence which establishes that the document was indeed an installment agreement, the Court holds that the document executed by Ullman on January 25, 1992 was an installment agreement.

To the extent that Ullman argues that the IRS' refusal to accept Ullman's offers in compromise is an unauthorized collection activity, Ullman's argument fails. Compromising tax liabilities is a purely discretionary activity and will not give rise to a claim for intentional, reckless or negligent violation of the Internal Revenue Code. See Addington v. United States, 75 F. Supp. 2d 520, 524 (S.D. W. Va. 1999).

IV. CONCLUSION

For the reasons stated above, the United States' Motion for Summary Judgment on Defendant's counter-claim pursuant to 26 U.S.C. § 7433 alleging that the IRS engaged in unauthorized collection activities is granted and Defendant's counterclaim is dismissed.

An appropriate Order follows.

NO. 02-2752

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE

v.

M. ROBERT ULLMAN,

APPELLANT

PETITION FOR REHEARING OF THE "JUDGMENT" ENTERED ON JANUARY 22, 2003

THE COURT OPINION OF JANUARY 22, 2003 CONTAINS FIVE ERRORS OF "GENUINE ISSUES OF MATERIAL FACTS" AND ONLY CONFIRMS THE ERRORS IN THE ARGUMENT OF THE UNITED STATES OF AMERICA IN THEIR MOTION FOR SUMMARY JUDGMENT.

M. ROBERT ULLMAN - PRO SE
1616 HILL ROAD
READING, PA. 19602
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THE ISSUE

THERE ARE 5 (FIVE) ERRORS OF GENUINE ISSUES OF MATERIAL FACT IN THE "OPINION" FILED ON JANUARY 28, 2003 BY THE UNITED STATES COURT OF APPEALS.

SUMMARY JUDGMENT PROCEDURE IS A METHOD FOR PROMPTLY DISPOSING OF ACTIONS IN WHICH THERE IS NO GENUINE (ACTUAL OR TRUE) ISSUE AS TO ANY MATERIAL FACT (A FACT THAT IS SIGNIFICANT OR ESSENTIAL TO THE ISSUES OR MATTER AT HAND). (RULE 59)

THE BASIC IRS RULES

Rule [5.14] 1.2 IRS Installment Handbook - Installment Agreements:

"Internal revenue Code Section **6159(a)** provides that Installment Agreements must fully Pay taxes before the Collection Statute Expiration Date (CSED)."

"Installment Agreements are arrangements whereby the Internal Revenue Service allows taxpayer to pay liabilities over time. ONLY AGREEMENTS THAT PROVIDE FOR FULL PAYMENT OF LIABILITY MAY BE GRANTED. During the course of agreements, penalty and interest continue to accrue."

Rule [5.14] 1.7 "CSED - Collection Statute Expiration Date":

"By policy, the Internal Service limits the length of installment agreements to the 10 year statutory collection period. (CSED)

THUS
IF THE 433D AGREEMENT IS TO QUALIFY AS AN "INSTALLMENT AGREEMENT" IT HAD TO PROVIDE FOR FULL PAYMENT OF THE $1,627,884.69 BEFORE THE FINAL CSED DATE OF FEBRUARY 4, 2001.

The debt as of January 25, 1995 (exhibit #2) (433D Agreement):

1. $ 952,010.88 (period ending Dec. 31, 1988) CSED date 10/23/99 (Exhibit #3)
2. $ 80,430.47 (period ending June 30, 1989) CSED date 2/4/01 (Exhibit #4)
3. $ 595,442.94 (interest to date)
   $1,627,884.69 total (Jan. 25, 1995)
   (growing at the rate of $103,244 per year (10% X 1,032,440). By Feb. 4, 2001 the total amount due after $600.00 monthly payment would be $2,300,192.

On September 18, 2000 the IRS corrected their error and changed the $80,430.47 to $45,651.51 (Exhibit #5). The IRS agreed that M. Robert Ullman was not the responsible party for the taxes due by Canoe Manufacturing Co. for the period from March 15, 1989 to June 30, 1989. (The **trustee was in charge.**)

The tax return for the period ending March 31, 1989 was filed in August, 1989 by the U. S. Trustee, and the IRS made an initial assessment against the U. S. Trustee and it took until Feb. 4, 1991 to correct the mistake and assess M. Robert Ullman. The IRS mistake artificially extended the CSED on the $80,430.47 (corrected to $45,651.51) by 14 months. If assessed correctly, the CSED date for the $80,430.47 would have expired prior to the 2001 action by the United States against M. Robert Ullman.

THE ERRORS

#1. Court Opinion: "On February 4, 1991 the IRS made an assessment against Ullman as a responsible person under #6672 with respect to unpaid employment taxes of Canoe Manufacturing Co. for the first and second quarter of 1989 in the amount of $80,430. The IRS subsequently abated $31,309 of the assessment, which reduced it to $49,121.00."

"The Installment Agreement also covered an assessment made against Ullman on October 23,1989 for the last two quarters of 1988, with a balance of $952,011. The October assessment is not an issue in the instant appeal because the government did not seek to reduce the assessment to judgment."

The Material Difference in Fact:

A. The 433D assessment covered the periods from Jan. 1, 1987 thru June 30, 1989. The ASSESSMENTS were made on two different dates - Oct. 23, 1989 and Feb. 4, 2001. (Exhibits 3 & 4).

B. **THE REASON THAT THE $952,011 WAS NOT INCLUDED IN THE UNITED STATES ACTION WAS BECAUSE THIS ACTION WAS INITIATED JANUARY OF 2001, 14 MONTHS AFTER THE CSED DATE ON THE $952,011.**

The only remaining amount was the $80,430, which was corrected on September 18, 2000 to $45,651. (Exhibit #5)

#2. Court Opinion: "After negotiating with the IRS, Ullman

entered into a written installment agreement which provided that he was required to make monthly payments of $600.00 UNTIL THE TAX LIABILITY WAS SATISFIED."

The Material Difference in Fact:

A. The $600.00 monthly payment could not pay an assessment of $1,627,884, growing at the rate of $103,244 per year in the time period ending Feb. 4, 2001.

The $7,200.00 per year payment would take an "INFINITE PERIOD" for payment as it was growing faster than it was being reduced!

The IRS agreed that the CSED dates were Oct. 23, 1999 and Feb. 4, 2001.

1.) January 6, 1998 - letter from District Director (Exhibit #6):
"The collection Statute of Limitations on the Trust Fund recovery penalty assessed in the amount of $952,010 will expire on October 23, 1999, while the statute on the penalty that was assessed in the amount of $80,430.47 is scheduled to expire on February 4, 2001."

#3. Court Opinion: "Ullman made the $600.00 payments until May, 2000 when he began paying approximately $225.00 per month. He believed that he could unilaterally reduce his payment on the installment agreement because his pension had reduced in a matter unrelated to this case."

#4. Court Opinion: "Specifically, Ullman claimed that he

had reached an oral agreement with an IRS agent when he signed the Installment Agreement that authorized him to reduced his monthly payments if his pension was reduced."

The Material Difference in Fact:

A. The IRS (Agent Clarke) and M. Robert Ullman began negotiating payment agreement in 1991.

B. The IRS (Agent Clarke) was provided with all of the requested materials:
(1.) tax returns of Kaye G. and M. Robert Ullman
(2.) all expenses of Kaye G. and M. Robert Ullman.

C. Negotiation with the Pension Benefit Guarantee Corp. regarding the possible reduction in the M. Robert Ullman monthly pension was in progress. The PBGC claimed that as a principal officer of the corporation Robert Ullman was not entitled to full benefits. A final determination was anticipated.

D. M. Robert Ullman's net income in 1994 included a monthly PBGC payment of $1,016.44 **($12,197.28 or 48% of Robert Ullman's gross income of $26,000).**

E. Agent Clarke and his superior DETERMINED that M. Robert Ullman could pay, and must pay, $600.00 per month. THIS DETERMINATION WAS BASED UPON THE IRS FORMULAE IN USE IN 1994, WHICH INCLUDED GROSS INCOME OF KAYE AND ROBERT ULLMAN LESS IRS ALLOWABLE EXPENSES.

F. Agent Clarke was fully aware of all of Robert Ullman's negotiations with the PBGC and his action against Meridian Bank.

G. Prior to signing the 433D Agreement on Jan. 25, 1995, Robert Ullman asked agent Clarke "What happens if the PBGC reduces their monthly payment?"

Agent Clarke answered, "We will reduce the monthly payment by a like amount."

Ullman asked, " How will I know that will happen?"

Clarke answered, "Read the condition of the contract." (Exhibit #7, which read "This agreement is based upon your current financial circumstances; it is subject to revision or termination if subsequent financial information required by the IRS reflects a change in your ability to pay.") "Trust me, it will happen."

Clarke also added, "To give you more confidence, I will insert 'agreement will be reevaluated on or about 1-26-97.'"

M. Robert Ullman signed the agreement only after Agent Clarke VERBALLY read aloud the conditions and typed in the re-evaluation feature.

On March 26, 1999, Mr. Romito, the Taxpayer Advocate, wrote re. the 433D Agreement (Exhibit #8): "However, I agree with you that it is sufficiently contract-like that both parties to the agreement are bound by its terms as though it was a contract."

IT IS IMPORTANT TO NOTE THAT THE IRS AND DEPARTMENT OF JUSTICE HAS NEVER BEEN WILLING TO SUPPLY ANY AFFIDAVIT, TESTI-

MONY OR OPINION FROM AGENT CLARKE REGARDING THESE EVENTS OF JANUARY 25, 1995.

H. March 10, 2000 (Exhibit #9) - the PBGC informed M. Robert Ullman that they were reducing his monthly pension from $1,016.44 to $641.44 or a **$375.00 reduction.**

I. April 3, 2000 (Exhibit #10) and April 17, 2000 (Exhibit #11) M. Robert Ullman informed the IRS (Mr. Bucci and Mr. Romito) about the $375.00 reduction and he REQUESTED a like amount reduction in his monthly payment. (THE LAST CSED DATE WAS 2/3/01.)

J. The IRS refused to honor their written agreement, and ONLY THEN did M. Robert Ullman reduce his monthly payments from $600.00 to $225.40 (a $375.00 reduction).

K. M. Robert Ullman continued to make his monthly payment of $225.40 until January of 2001 when the IRS brought the action in U. S. District Court.

L. THE 8 PAYMENTS OF $225.40 (UNTIL THE CSED DATE) AMOUNTED TO A SAVINGS TO ULLMAN OF $3,000.00.

M. On April 10, 2000 the Taxpayer Advocate wrote: "The COSED will expire in February 2001. It may be unfair to the TP and counterproductive for the government to hold the line, perhaps extending the statute and litigation for $4,500.00 we would not realize in a $200,000 debt we will write off in 11 months." (Exhibit #12)

"Reject Ullman proposal of April 3, 2000 (Exhibit #10) as frivolous since we have pointed out many times that his current $600.00 was far below acceptable when it was established, irrespective of an alleged promise of reduction the ... revenue officer who established the agreement."

It is important to note that the $600.00 was the amount that the IRS requested Ullman to pay. It is also important to note that 3 months earlier the IRS had proposed a $400.00 monthly payment. However, the IRS supervisor rejected the $400.00 which was established by his fellow agent. (Exhibit #19)

#5. Court Opinion

"The court reasoned that the agreement was not a contract because of the absence of consideration on the part of Ullman. Moreover, the agreement operated pursuant to statute. The statute does not authorize the IRS to execute oral agreements. Thus, even if the IRS did breach oral agreements, that breach would not constitute a violation of Internal Revenue Code. See 26 U.S. C. 6159."

The Material Difference in Fact

A. The 433D Agreement signed by M. Robert Ullman and prepared by Agent Eugene Clarke DOES NOT QUALIFY AS AN INSTALLMENT AGREE-MENT BECAUSE IT NEVER WAS INTENDED (INTENT) TO PAY THE TOTAL TAX DEBT IN FULL. It was at best a "stop gap" agreement to be rewritten when the PBGC made their final determination Oct. 4, 2002.

B. Opinion of Attorney Jack Linton on October 4,

2002, the attorney who represented M. Robert Ullman until November of 1994.
Attorney Linton wrote: (Exhibit #13)

(1) "We entered into good faith negotiation with the Service and had arranged an agreement with Mr. Clarke at $400.00 per month to be reviewed at the end of one year based upon your concerns about possible reductions in your pension payments."
(referring to the October, 1994 original 433D Agreement (Exhibit #19).

(2) "There is no doubt that all concerned were aware that this was a STOP GAP AGREEMENT pending the outcome if your litigation with Meridian Bank since, based upon your income and monthly payments that you would be making, there was no reasonable possibility of the liability assessed by the Internal Revenue Service being paid in full."

C. ON OR ABOUT JANUARY 25, 1995 AGENT EUGENE CLARKE WROTE (F.O.I. REQUEST): (Exhibits 14 & 15)

ITEM 6. "M. Robert Ullman, in his capacity as stockholder and/or his own behalf has instituted a lender liability action in the Schuylkill County courts against Meridian Bank. This action has just entered the discovery stage. Levys have been served on Meridian and its counsel. Recovery is question-able at best and certainly not to be anticipated in the near future."
Item 7. "Trust Fund recovery penalty assessments have been made against M. Robert Ullman in the amounts of $952,010.88 and $80,430.47 on October 23, 1989 and Feb. 4, 1991

respectively. Mr. Ullman entered into an installment agreement and is paying $600.00 per month on the liabilities. THERE IS NO POTENTIAL FOR FULL PAYMENT FROM MR. ULLMAN OTHER THAN THE ACTION DESCRIBED IN ITEM 6."

Note: Mr. Clarke was referring to Item 6 - the Ullman action against Meridian Bank. It must be noted that the Schuylkill County Court ruled in favor of Meridian Bank on a bank motion for Summary Judgment on December 22, 2000 (Exhibit #16).

D. The "consideration" was:

(1.) The IRS withdrew their attachment on M. Robert Ullman's monthly social security and pension payments. (Exhibit Nos. 17 and 18)

(2.) M. Robert Ullman agreed to pay $600.00 per month until the expiration date (CSED) of February 4, 2001,with exception.

(3.) Robert Ullman agreed that IF HE WAS SUCCESSFUL in his action against Meridian Bank, the debt would have been paid in full. It was Ullman who provided the full details of the Ullman/Canoe action against Meridian Bank and Atty. Joseph Jones. The IRS had issued Notice of Levy to Meridian Bank and the Ullman attorney, Robert Fellheimer, on October 13, 1993. (Exhibit #21)

IN CONCLUSION

The evidence, exhibits provided were all included in the appeal by M. Robert Ullman to the District Court ruling

M. ROBERT ULLMAN PRAYS THAT THE COURT WILL ACCEPT HIS PETITION FOR REHEARING and will rule favorably in this matter and allow this case to be a jury trial in Federal District Court.

Respectfully submitted,

M. Robert Ullman

EXHIBITS

#1	The court order and opinion of Jan. 28, 2003
#2	The Jan. 25, 1995 422D Agreement
#3	December 31, 1988 assessment $952,010.88
#4	June 30, 1989 assessment - $80,430.47
#5	September 18, 2000 Corrected assessment - $45,651.51
#6	Jan. 6, 1998 Letter from District Director
#7	Enlarged conditions of the Jan. 25, 1995 433D Agreement
#8	March 20, 1999 letter from Mr. Romito (Taxpayer Advocate)
#9	March 10, 2000 - PBGC letter re. reduction
#10	April 3, 2000 Ullman letter to Taxpayer Advocate
#11	April 17, 2000 Ullman letter to Taxpayer Advocate
#12	April 10, 2000 Notes of Taxpayer advocate
#13	October 4, 2002 Opinion of Atty. Jack Linton
#14	Nov. 30, 1994 - Memo of Agent Eugene Clarke
#15	Jan. 25, 1995 - Memo of Agent Eugene Clarke
#16	Dec. 22, 2000 - Schuylkill County Court order
#17	November 7, 1994 - Social Security attachment
#18	January 12,1995 - Pension attachment
#19	October 14, 1994 - First 433D Agreement (note re. "full payment")
#20	May 8, 2002 - District Court order

#21 October 13, 1993 - Notice of Levy to Meridian Bank and Attorney Fellheimer

#22 February 11, 2002 - U. S. Motion for Summary Judgment